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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1596

DENISE GARMON, and
COURTNEY WASHINGTON,

PETITIONERS,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

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RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Denise Garmon, and Courtney Washington, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered 6 April, 1978.

OPINION BELOW

The Court of Appeals entered its opinion and judgment on 6 April, 1978. A copy of the opinion is attached as Appendix A.

JURISDICTION

On 6 April, 1978, the Court of Appeals entered judgment affirming the criminal conviction of petitioners for conspiring to possess heroin with intent to distribute, in violation of Title 21, United States Code, Sections 841(a)(1) and 846. The jurisdiction of the Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

Whether the arrest and search of petitioners violated the Fourth Amendment?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in thier persons, houses,

> papers, and effects, against unreasonable searches and seizures, shall not be violated,. . .

STATUTORY PROVISIONS INVOLVED

Title 21, United States Code, Section 841(a):

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --
>
> (1) to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense a controlled substance;

Title 21, United States Code, Section 846:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or

fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Title 21, United States Code, Section 878:

> Any officer or employee of the Bureau of Narcotics and Dangerous Drugs designated by the Attorney General may --
>
> (2) execute and serve search warrants, arrest warrants, . . .;
>
> (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that

> the person to be arrested has committed or is committing a felony;
>
> (4) make seizures of property pursuant to the provisions of this subchapter; . . . .

STATEMENT OF THE CASE

On April 26, 1977, Agent Perkins of the Drug Enforcement Administration (hereinafter denominated DEA) was advised by Agent Gore of DEA that Agent Gore had been advised by an employer of the Royal Inns that two black males had registered, one of whom had registered several times in the past using different names and addresses from Chicago. On each occasion, the registration would be for one day with payment in cash and the guest did not have luggage. (R.T. 8-11).[1/] A surveillance

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1/ "R.T." refers to Reporter's Transcript of the trial.

was initiated. [R.T. 29]. At approximately 7:00 p.m. visitors were received at a surveilled room. They left in about five minutes. [R.T. 12]. Surveillance was terminated at 11:00 p.m. the evening of April 26, 1977. [R.T. 13].

On April 27, 1977, surveillance was resumed at approximately 7:30 a.m. At approximately 10:00 a.m. the agent requested a phone call be placed by hotel personnel to the room to determine if the room was occupied. Agent Perkins was advised cleaning personnel would be going to the room shortly and he would be advised if anyone was in the room. [R.T. 14]. Between 10:00 and 10:30 a.m. Agent Perkins received telephonic permission from the front desk manager to enter the room. Inside the room there were no personal effects. A small plastic bag

containing a brown powder residue which tested positive for heroin, was found. Agent Perkins was advised by other agents that reservations had been made on the 9:30 p.m. flight on April 26, 1977 for two men using the names Dameron and Washington, one petitioner here, (R.T. 15). Dameron caught the flight while Washington was a no-show. (R.T. 31). The agent had no permission to search and seize anything found in the room. (R.T. 16).

On May 5, 1977, Agent Perkins received a phone call from Agent Gore stating Petitioner Washington, using the name Donald Scott, and a friend, Petitioner Garmon had registered for one day in separate rooms and had no luggage. (R.T. 17). DEA initiated surveillance.

At approximately 1:30 p.m., petitioner Garmon paid for another day's lodging. A couple and child of Mexican appearance entered the room at 2:45 p.m., and left

approximately six minutes later. The lady had two purses when entering the room and only one when leaving. (R.T. 18 & 19). The couple entered a vehicle and left the area of the hotel.

Agent Perkins was then advised a warrant of arrest was being sought for petitioner Washington. (R.T. 20). Prior to the application for arrest warrant, the agents met and decided the warrant would be a convenient vehicle for the search of petitioner Washington. This was in large part the reason for securing an arrest warrant. (R.T. 94). This was the only misdemeanor arrest warrant secured by the DEA within the past year. (R.T. 99).

At 3:40 p.m., the petitioner came out of Room 216. Petitioner Garmon was carrying a brown lady's purse. In the parking lot of the hotel, agents approached petitioners and formally placed petitioner Washington under

arrest. (R.T. 21-25). The agents approached the suspects with guns drawn. (R.T. 108). At the time of petitioner's arrest, Agent Perkins had not been advised whether the arrest warrant had been issued. The arrest warrant was issued May 5, 1977, for misdemeanor possession of narcotics on April 27, 1977.

Agent Dobson patted petitioner Washington down and felt a square hard object in the groin area of his pants. Agent Perkins saw a similarly shaped object in the front of petitioner Garmon, under her dress. (R.T. 25-26). A search of petitioner Washington produced a five to six inch long by two to three inches thick package wrapped in electrical tape. A search of petitioner Garmon by a matron produced a similar package. Each was later found to contain heroin. (R.T. 27-28).

Petitioners' motion to suppress the heroin was heard and denied on July 5 and

6, 1977, the District Court basing its denial on a finding of probable cause for the arrest of the petitioners. (R.T. 184).

On August 4, 1977, petitioners were found guilty of the conspiracy count after a trial on stipulated facts and the transcript of the motion hearing excluding testimony inadmissible for trial. (R.T. 189-194). A second count, charging petitioners with the underlying substantive offense, had previously been dismissed. (C.R. 148, 150).[2/]

On December 12, 1977, petitioner Garmon was sentenced to the custody of the Attorney General for a period of eighteen months, following a study pursuant to Title 18, United States Code, Section 4205(d). She also received a special parole term of seven (7) years. (C.R. 151). On September 19, 1977,

2/ "C.R." refers to Clerk's Record

petitioner Washington was sentenced to the custody of the Attorney General for eighteen months with a special parole term of twelve years.

REASONS FOR GRANTING THE WRIT

The resolution of the issue whether it is permissible for drug enforcement agents to rely principally on "drug carrier profiles" to establish a founded suspicion or probable cause is important to the application of the Fourth Amendment in a widening area of law enforcement and is necessary to harmonize a conflict among the United States Court of Appeals.

Petitioner Garmon was arrested by Drug Enforcement Administration agents when she was found in the company of her co-petitioner, Courtney Washington. The validity of the latter's arrest bears on the validity of petitioner Garmon's arrest in that her detention and pat-down were justified by her status as a

companion of an arrestee.[3/]

3/ Petitioner Garmon asserted on appeal, and reiterates here, that her arrest in fact occurred when she and her co-petitioner were accosted at gun-point and their freedom of movement forcibly restrained. Agent Irwin testified that he grabbed Garmon's arm at the moment of his encounter with the suspects. (R.T. 107). An arrest occurs at the point where the suspect's freedom of movement has been curtailed as determined by the facts and circumstances of each case. Henry v. United States, 361 U.S. 98, 103 (1959); Sibron v. New York, 392 U.S. 40, 67 (1968).

Assuming, then, that her de facto arrest occurred simultaneously with that of her co-defendant, it was illegal due to the absence of probable cause to support it. Her arrest was motivated solely by her mere presence in the company of her co-petitioner and her contact with the so-called "Mexican-appearing"

Ker v. California, 374 U.S. 23, 36-37 (1963); United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971).

Though there is some question here as to whether the arrest of petitioner Washington occurred pursuant to a misdemeanor arrest warrant relating to events occurring one week earlier or pursuant to independent probable cause, the question remains whether the facts and circumstances conveyed to the issuing Magistrate, Jaben v. United States, 381 U.S. 214 (1965), rehearing denied, 382 U.S. 873, or within the agent's knowledge, Brinegar v. United States, 358 U.S. 160,

couple. Where detention was based on mere association with narcotics addicts, this Court has held that, ". . .nothing resembling probable cause existed until after a search disclosed possession of heroin", Sibron v. New York, supra, at 62-63.

175-76 (1949), were such that the requisite probable cause existed to support the arrest.[4/]

4/ With respect to the misdemeanor arrest warrant, prior to their application therefor, the agents met and decided the warrant would be a convenient vehicle for the search of petitioner Washington. This, in fact, was in large part of the reason for securing the warrant, (R.T. 94), a fact that is highlighted by testimony that this was the only misdemeanor arrest warrant sought by the agents within the previous year. (R.T. 99). The validity of the warrant under these circumstances is suspect under Taglevore v. United States, 291 F.2d 262 (9th Cir. 1961).

The government relied on the following facts to establish probable cause:

1) On April 26, 1977, petitioner Washington was in a motel room in San Diego at 6:45 p.m. He was registered there with another black male. There was no evidence that the motel was a known site of drug trafficking.

2) In the late morning of April 27, 1977, Drug Enforcement Administration Agents entered the then unoccupied room and found a plastic bag containing heroin residue. The agents had no permission to search and seize anything found in the room. (R.T. 16).

3) Petitioner Washington had stayed at the motel on several occasions in the past year using different names and addresses.

4) Washington normally stayed for one day.

5) On May 5, 1977, a "Mexican-appearing" couple visited petitioner Washington at the motel. The couple was accompanied by a small child.

6) There was ambigious testimony as to whether the Mexican appearing woman carried two purses or only one.

A realistic approach to the above facts indicates that none taken individually nor all taken together suffice to constitute probable cause to believe a felony has been committed. The conduct mentioned is not inconsistent with innocence. Though the experience of agents has been recognized to be a relevant factor in the determination of the existence of probable cause, United States v. Bates, 533 F.2d 466, 469 (9th Cir. 1976), it is not sufficient

in itself:

> "The inarticulate hunch, the awareness of something unusual, is reason enough for officers to look sharp. . . But awareness of the unusual, and proper resolve to keep a sharp eye, is not the same as an articulate suspicion of criminal conduct. United States v. Montgomery, 561 F.2d 875, 879 (D.C. Cir. 1977).

The Court of Appeals for the Ninth Circuit was apparently impressed with the fact that the conduct listed above fit the "drug courier profile" used by the Drug Administration . Memorandum Opinion No. 77-3352, at Page 3 - 4, Appendix A, and that thereby there was the requisite probable cause to support an arrest. The Court of Appeals for the Sixth Circuit has held that a "drug courier profile", similar in content to the elements cited here, is insufficient to establish probable cause to

arrest. United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977). Similarly the Sixth Circuit has noted that matching the "drug courier profile" does not even constitute the founded suspicion necessary to justify a brief detention under Terry v. Ohio, 392 U.S. 1 (1968). United States v. Pope, 561 F.2d 663, 667-68 (6th Cir. 1977). The issue has now appeared in the Second Circuit where United States v. Westerbann-Martinez, 435 F. Supp. 690, 698-99 (E.D. N.Y. 1977), followed McCaleb, supra, in finding the inadequacy of the "drug courier profile" in establishing reasonable suspicion. In the instant case, the Ninth Circuit refrained from following these recent holdings of the Sixth Circuit and hence a conflict exists.

CONCLUSION

For these reasons, the Petitioners, Denise Garmon and Courtney Washington, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

Respectfully submitted,

DATED: May 3, 1978

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DATED: May 3, 1978

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. COURTNEY D. WASHINGTON, Defendant-Appellant.	)	No. 77-3352
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DENISE GARMON, Defendant-Appellant.	)	No. 77-3441
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. JORGE MARCOS-MARTINEZ, Defendant-Appellant.	)	No. 77-3290 MEMORANDUM

Appeal from the United States District Court for the Southern District of California

Before: ELY, TRASK and ANDERSON, Circuit Judges

The three appellants come to this court seeking relief from convictions resulting from a drug smuggling conspiracy. Appellant Martinez was convicted of conspiracy to possess heroin with intent to distribute (21 U.S.C. section 846) and possession of heroin with intent to distribute (21 U.S.C. section 841(a)(1)). Appellants Washington and Garmon were convicted of the conspiracy charge only.

Prior to trial, a suppression hearing was held to determine the validity of the search and seizure that produce the heroin. That motion was denied. All three appellants then waived a jury trial and proceeded to trial on stipulated facts.

Appellants' sole issue on appeal involves the propriety of their stop, searches and arrests. Their contentions

are without merit and we affirm the district court's determination.

The activities of the appellants first came to the attention of narcotics officers on April 26, 1977. Agents in San Diego received information from an employee of the Royal Inn Motel at Point Loma. They were told that two black males had checked into the motel for one night under the names Courtney Washington (appellant) and Larry Dameron. The men had stayed at the motel before, but under different names and using different addresses. They carried no luggage, and paid cash for the room in advance. This was recognized by the drug agents as a common method of operation for drug smugglers, so a surveillance was set up at the motel. The agent heard several people enter the room and leave a few moments later, but he did not see them. He did hear a child's voice in the

hall. The next day, after Washington checked out, the maid let the agents into the room. A plastic bag was found containing heroin residue.

A little over a week later, May 5, 1977, drug agents were told that Washington was back, but registered under a different name. With him was a black female, Denise Garmon (appellant). They paid cash, brought no luggage and told the clerk they would be staying for one night.

On learning of Washington's return, agents decided to obtain an arrest warrant and set up another surveillance.

On the afternoon of the 5th at 2:45, the agents saw Martinez (appellant), his wife (a codefendant not appealing here) and a small child, enter Washington's room. Mrs. Martinez carried two purses into the room. When the Martinezes arrived, the drapes were drawn. About six minutes later, the Martinezes left

with Mrs. Martinez carrying only one bag. They were followed as they left in a car.

The arrest warrant for Washington was obtained at 3:20 p.m. One of the surveillance agents (Irwin) was informed that the warrant was issued.

A few minutes later, Washington and Garmon left their motel room. Garmon was carrying a shopping sack and Washington was carrying the lady's purse that Mrs. Martinez had brought to the motel room. Agent Perkins, with agents Irwin, Dobson and Flores present, arrested Washington. Washington was patted down. In his pants was a small package filled with heroin. Agent Irwin noticed a similarly shaped bulge under Garmon's skirt. Garmon was then detained. When she was searched later by a police matron, a package containing heroin was discovered and she was arrested.

Washington alleges this arrest was without probable cause. Consequently,

the search was also improper and the heroin must be suppressed.

As shown from the above facts, Washington's contention has no merit. First, an arrest warrant had issued. One of the arresting officers knew it had issued. Even if no warrant had issued, the officers knew of sufficient facts to give a man of reasonable caution a belief that an offense had been committed. United States v. Watson, 423 U.S. 411 (1976); Brinegar v. United States, 358 U.S. 160, 175-76 (1949).

Appellant Garmon claims her arrest and subsequent search were improper as fruits of Washington's improper arrest. This argument is unsuccessful because Washington's arrest was proper.

Garmon also complains that her detention, arrest and search were not supported by probable cause. Assuming

officers had no probable cause to arrest Garmon when they arrested Washington, they did have a right to do a weapons pat-down of the arrestee's associate. Ker v. California, 374 U.S. 23, 36-37 (1963); United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971). The package containing heroin was seen bulging from Garmon's skirt. She was properly arrested after the later pat-down by a police matron.

While the above-described activities were taking place at the motel, Martinez's car was being followed. When his vehicle entered Interstate Highway 5, agents became concerned that they might lose the car in traffic, so the car was stopped. Martinez provided officers with his identification, but a license plate check showed the car was registered to someone else. Mrs. Martinez then produced a bill of sale from a Tijuana car dealer.

The car dealer is a known source for narcotics load cars. Martinez told officers he had just come from Anthony's Restaurant, which the officers knew to be false.

No arrest took place at this time, but the Martinezes were detained for about 30 minutes. When, the officers received word of Washington's and Garmon's arrests, Mrs. Martinez was then asked for identification. When she opened her purse, officers saw a package wrapped in masking tape. This is often the way narcotics are carried. Since the officers knew that, the package was seized. Instead of narcotics, the package contained $20,000. The Martinezes were then arrested.

Appellant Martinez claims that his original detention was an improper arrest and his continued detention for up to 30 minutes was unreasonable in scope.

The government contends that the original stop of the car was proper on the founded suspicion of criminal activity. United States v. Rocha-Lopez, 527 F.2d 476 (9th Cir. 1975). This seems fully supported by the known involvement between Martinez, Washington and Garmon.

Appellant argues that if this initial stop was valid, its duration was impermissible in scope.

> In appropriate instances this court has consistently permitted "the brief detention of citizens under circumstances not justifying an arrest, for purposes of limited inquiry in the course of routine police investigation." . . . The test for determining the lawfulness of such police detentions is whether, under the totality of the circumstances, they are reasonable. One of the factors in the assessment of their reasonableness is the extent of the detention. . . Although appellant's eventual detention for over an hour cannot be considered a "brief" or "momentary" stop, in the particular circumstances of this case we believe that this extended detention was reasonable.

United States v. Richards, 500 F.2d 1025, 1029 (9th Cir. 1974) (citations omitted).

Under the totality of the circumstances here, it cannot be said that the detention here was unduly long.

Judgment as to all three appellants is AFFIRMED.